

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ESTATE OF HARRY EMERY

Claimant

VS.

STATE OF KANSAS

Respondent

AND

STATE SELF-INSURANCE FUND

Insurance Fund

Docket Nos. 1,005,338
& 1,038,104

ORDER

The parties appealed the November 4, 2011, Award entered by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Workers Compensation Board heard oral argument on January 25, 2012.

APPEARANCES

Joshua P. Perkins of Kansas City, Missouri, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At oral argument, respondent stipulated that claimant had a 10% permanent impairment to the left upper extremity. The parties also stipulated that pursuant to K.S.A. 44-510e(b), the payment of workers compensation benefits to claimant ends on the date Mr. Emery died.

ISSUES

Harry Emery, the injured employee in this matter, passed away on October 11, 2009, from causes unrelated to the work accidents. On July 23, 2010, claimant's attorney filed a Motion for Substitution of Party, requesting Lisa Emery, the surviving spouse, be

substituted as the claimant. On August 4, 2010, claimant's attorney filed a Motion for Substitution of Party, requesting the Estate of Harry Emery be substituted as the claimant.

Left upper extremity and right upper extremity injuries were claimed in Docket No. 1,005,338. A head injury was claimed in Docket No. 1,038,104. At regular hearing, respondent admitted in both claims that claimant: (1) met with personal injury by accident arising out of and in the course of his employment with respondent; (2) gave timely notice to respondent; and (3) made a timely written claim to respondent.

In his November 4, 2011, Award, ALJ Hursh found the substitution of Mr. Emery's estate was proper and timely. In Docket No. 1,005,338, ALJ Hursh awarded authorized medical expenses, 57.57 weeks of temporary total disability (TTD) benefits, and permanent partial disability benefits for a 10% functional impairment to the left arm, including 0.14 weeks credit for overpaid TTD benefits. No permanent partial disability benefits were awarded for Mr. Emery's right elbow. The ALJ found there was nothing in the record to prove a work-related injury to the right elbow. Additionally in Docket No. 1,005,338, respondent was ordered to pay a penalty of \$269.37 for failure to pay compensation without just cause. ALJ Hursh determined the penalty should be assessed from the date the Estate of Harry Emery became a party, July 23, 2010. Regarding attorney fees, the ALJ states in the Award that claimant's attorney fees would be considered upon presentation of the contract of employment and subject to the disposition of Timothy Power's lien.¹ In Docket No. 1,038,104, ALJ Hursh awarded authorized medical expenses and 92.14 weeks of TTD benefits. No permanent partial disability benefits were awarded for Mr. Emery's head injury.

Claimant contends Harry Emery sustained a 17% functional impairment of the left upper extremity, a 20% functional impairment of the right upper extremity, and a 17% whole body functional impairment for his closed head injury. Claimant requests permanent partial disability compensation based upon these functional impairments. Claimant asserts the right upper extremity injury is compensable. Claimant submits ALJ Hursh properly assessed an interest penalty for respondent's failure to pay compensation prior to an award without just cause; however, claimant argues the interest penalty should be applied to all of the injuries. Additionally, claimant contends the ALJ erred in determining when the penalty should begin to be assessed and erred in the calculation of the interest penalty.

Respondent maintains the motion to substitute a party was not timely. Further, respondent contends the cause of action in the workers compensation claims did not survive the death of Harry Emery. In Docket No. 1,005,338, respondent did not contest the 10% left upper extremity functional impairment. In Docket No. 1,005,338, respondent argues claimant has not met the burden of proving a right upper extremity injury

¹ Attorney Timothy Power filed a Motion to Withdraw as Harry Emery's attorney on March 18, 2010. ALJ Hursh granted the motion in an Order of Withdrawal entered on April 7, 2010.

attributable to the accident. In Docket No. 1,038,104, respondent asserts claimant failed to meet his burden of proof to establish Mr. Emery sustained any permanent impairment as a result of the head injury.

1. In both claims, did claimant file the Motion for Substitution of Party within a reasonable time?

2. In Docket No. 1,005,338, what is the nature and extent of Mr. Emery's disability to the left upper extremity?

3. In Docket No. 1,005,338, did claimant prove by a preponderance of the evidence that he sustained a work-related injury to his right upper extremity? If so, what was the nature and extent of Mr. Emery's disability?

4. In Docket No. 1,038,104, did the ALJ err by finding claimant failed to meet its burden of proof that Mr. Emery sustained a permanent impairment as a result of his head injury? If so, what was the nature and extent of Mr. Emery's disability?

5. Is claimant entitled to interest pursuant to K.S.A. 44-512b? Claimant asserts it should be awarded interest beginning with the date Mr. Emery reached MMI for his injuries. Respondent asserts no interest should be awarded as there was just cause for not paying Mr. Emery and/or claimant disability benefits prior to the date of the Award.

FINDINGS OF FACT

After reviewing the entire record and considering the parties' arguments, the Board finds:

Facts Applicable to Both Claims

Harry Emery died on October 11, 2009, for reasons unrelated to his workers compensation claims. At the time of his death, claimant was represented by Timothy Power. Lisa Emery, Harry Emery's wife, terminated the services of Mr. Power and hired her current counsel, Joshua P. Perkins. Lisa Emery filed a Motion for Substitution of Party in both claims requesting she be substituted as a party for Mr. Emery. The motions were filed with the Division of Workers Compensation on July 23, 2010. Respondent filed a Motion to Dismiss in both claims on July 28, 2010, alleging Lisa Emery's motion was not timely filed. On August 4, 2010, the Estate of Harry L. Emery filed a Motion for Substitution of Party asking that it be substituted as a party for Mr. Emery. On August 12, 2010, Lisa Emery was appointed as administratrix of Harry Emery's estate in Miami County, Kansas.

On September 15, 2010, following a hearing, ALJ Hursh issued an Order denying respondent's motion to dismiss both claims and granting the motion to substitute the Estate

of Harry L. Emery as the claimant. The ALJ cited *Belk*,² where the Board incorporated K.S.A. 60-225(a)(1) into a workers compensation claim. The ALJ indicated the delay of the Estate of Harry L. Emery in filing its Motion for Substitution of Party did not prejudice respondent. The September 15, 2010, Order was appealed to this Board. The Board dismissed the appeal because the Order denying respondent's Motion to Dismiss was not a final Order, and, thus, was not appealable under K.S.A. 44-551. Both claims then proceeded to Award.

Claimant took the deposition of Dr. Michael J. Poppa, an occupational and preventive medicine physician, on August 18, 2011. Dr. Poppa never saw Mr. Emery. Claimant's attorney employed Dr. Poppa to review the medical records of Mr. Emery generated as a result of his injuries in Docket Nos. 1,005,338 and 1,038,104. In Docket No. 1,005,338, Dr. Poppa reviewed the medical records of Dr. Alexandra J. Strong, Dr. John B. Moore, IV, and SurgiCenter of Kansas City. In Docket No. 1,038,104, Dr. Poppa reviewed the medical records of Drs. James S. Zarr, Satake and Staecker, among others.

At regular hearing, respondent stipulated that in both claims, Mr. Emery met with personal injury by accident arising out of and in the course of his employment, but disputed the nature and extent of his injuries and impairment. Claimant's attorney attempted to introduce the medical records of Drs. Alexandra J. Strong and John B. Moore, IV, who treated claimant for his injuries in Docket No. 1,005,338, and Dr. James S. Zarr, who evaluated claimant for his head injury in Docket No. 1,038,104. Respondent's attorney objected that the records were medical hearsay, and the ALJ sustained the objection because none of the three physicians testified. Lisa Emery testified at the regular hearing that she was the surviving spouse of Harry Emery and he was survived by two adult children, both of whom were born to their marriage. Harry Emery did not testify in either claim.

On July 21, 2011, claimant filed a Motion for Interest for Failure to Pay Compensation Prior to Award Without Just Cause. The gist of claimant's motion was that Harry Emery had reached MMI prior to the regular hearing and prior to his death and received permanent impairment ratings. Respondent was in possession of the impairment ratings, but failed to pay compensation pursuant to the impairment ratings.

A hearing was held on claimant's motion for interest on October 10, 2011. Claimant sought interest in Docket No. 1,005,338 for the left upper extremity commencing June 5, 2003, and on the right upper extremity commencing October 21, 2008. In Docket No. 1,038,104, claimant sought interest from October 5, 2009, for the closed head injuries. Respondent objected that this issue was not raised at the regular hearing and, therefore, claimant's motion should be dismissed. The ALJ awarded interest in Docket No. 1,005,338 of 4.75% on \$4,396.10, commencing July 23, 2010, the date the Estate of Harry L. Emery

² *Belk v. State of Kansas*, No. 1,024,926, 2010 WL 769922 (Kan. WCAB Feb. 25 2010).

became a party to the claim, for a total of \$269.37. No interest was awarded in Docket No. 1,038,104.

The ALJ indicated that K.S.A. 60-225(a) applies to this claim and requires a motion to substitute be filed within a reasonable time after the original party's death. The ALJ concluded that claimant filed a Motion for Substitution of Party in a timely manner and stated in his Award:

For workers compensation matters the court takes guidance from K.S.A. 44-520a. That section allows one year from the death of the employee for the claimant to serve a claim for compensation on the employer, where the death resulted from the injury. If a year is considered sufficiently timely for claiming benefits in the case of a work related death it seems fair to apply the same standard to claiming benefits in the event of a non-work related death. Because the substitution of party in this case occurred within one year it is not considered an unreasonable delay and the substitution shall stand.³

Docket No. 1,005,338

On July 31, 2002, Harry Emery filed an Application for Hearing in Docket No. 1,005,338. He alleged an initial injury to his head, neck, and left elbow and, thereafter, the right upper extremity due to overuse. The date of accident was listed as "Initial injury on 4-6-02, and each and everyday worked thereafter."⁴ Harry Emery alleged his injuries were caused when he was assaulted and battered by a patient, and ongoing work-related activities thereafter.

Dr. Poppa testified on behalf of the claimant. He never saw Harry Emery, but was asked to perform a review of Mr. Emery's medical records. He reviewed reports of Drs. Strong and Moore and SurgiCenter of Kansas City concerning Mr. Emery's right and left upper extremity injuries. Dr. Strong's treatment note dated June 19, 2002, indicated Mr. Emery fell while taking down a patient and struck his left elbow. Following the fall, claimant performed repetitive work in the laundry and developed more lateral pain on the left.

Sometime after April 6, 2002, Mr. Emery underwent left elbow cubital tunnel release, left lateral epicondylar release and left forearm radial nerve decompression by Dr. Strong. At Dr. Poppa's deposition, claimant introduced a one-page letter from Dr. Strong to Janice Rasch of the State Self-Insurance Fund dated June 5, 2003, stating Mr. Emery had a 15% permanent impairment to the left upper extremity and a 2% permanent impairment to the

³ ALJ Award (Nov. 4, 2011) at 3-4.

⁴ Application for Hearing, Docket No. 1,005,338 (filed July 31, 2002).

left elbow in accordance with the *Guides*.⁵ Dr. Strong's letter did not cite the section of the *Guides* she relied on. Respondent objected that Dr. Strong's impairment rating was hearsay. Respondent objected to Dr. Strong's letter on the grounds that it contained the medical opinions of a non-testifying physician.

Dr. Poppa opined that pursuant to the *Guides*, claimant had a 17% permanent impairment to the left upper extremity. Upon cross-examination by respondent's counsel, Dr. Poppa acknowledged he assigned Mr. Emery a 10% permanent impairment for a mild degree of severity in the ulnar nerve of the left elbow pursuant to Table 16 on page 57 of the *Guides*. He assigned Mr. Emery an additional 7% impairment because the *Guides* did not adequately address the lateral epicondylitis. He testified that Section 1.3 of the *Guides* indicates that not every type and degree of impairment is covered by the *Guides*; therefore, the physician may use his or her own judgment in estimating a permanent impairment.⁶

Dr. Poppa testified that as a result of Mr. Emery's repetitive work activities involving his right upper extremity at Osawatomie State Hospital (respondent), Mr. Emery developed pain and was treated by Dr. Moore. However, no testimony was elicited from Dr. Poppa as to the nature or frequency of repetitive work activities that caused Mr. Emery's right upper extremity injury. Dr. Poppa's testimony concerning causation of the right upper extremity was: "[a]s a result of Mr. Emery's series of work related accidents up to and through 4-6-02 while employed by Osawatomie State Hospital involving his right upper extremity, he developed pain and symptoms and was seen in consultation by Dr. J.B. Moore."⁷ Dr. Poppa testified as follows:

Q. (Mr. Benedict) So you don't know when the right upper extremity symptoms manifested themselves; do you?

A. (Dr. Poppa) No. I can only tell you when he had surgery and was seen by Dr. Moore for treatment of his right upper extremity issues.

Q. That's fine, when was that?

A. He was -- the surgery was performed on 6-14-07 and I believe I saw a note here Dr. Moore had seen him on 6-8 of '07.

Q. So what is your explanation for the apparent four-year gap from when he was rated in June of 2003 for the left upper extremity to when he's getting treatment for the right?

⁵ American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

⁶ Poppa Depo. at 27-28.

⁷ *Id.*, at 8-9.

A. My best guess is that the insurance carrier did not authorize treatment until a later date.

Q. Do you have any facts to back that up?

A. No it's -- it's not an opinion. You asked what I thought so I guess it is an opinion.⁸

Dr. Moore performed a right elbow cubital tunnel release, right lateral epicondylar release and right forearm radial nerve decompression sometime after Mr. Emery was released by Dr. Strong. A letter from Dr. Moore to Carol Wilken of the Kansas Health Policy Authority dated October 21, 2008, stated Mr. Emery had a 20% permanent impairment to the right upper extremity based upon a 1% impairment of motion in the right upper extremity and a 20% impairment for loss of grip strength. The letter indicated Dr. Moore utilized the appropriate tables within the *Guides*. Dr. Moore's letter did not cite the section of the *Guides* he relied upon. Nor does Dr. Moore's letter indicate that Mr. Emery's right upper extremity condition was caused, aggravated, accelerated or exacerbated by work-related activities. Respondent objected that Dr. Poppa's testimony about Dr. Moore's functional impairment opinion was hearsay. Respondent objected to Dr. Moore's letter on the grounds that it contained the medical opinions of a non-testifying physician.

Dr. Poppa testified he assigned Mr. Emery a 20% permanent impairment to the right upper extremity. This was based upon a 1% for an impairment to the right radial nerve and a 20% impairment for loss of grip strength. Dr. Poppa utilized Table 11 on page 48 of the *Guides* to calculate the 1% impairment to the right radial nerve and Table 34 on page 65 of the *Guides* which indicates a 41% strength loss equals a 20% impairment. Dr. Poppa acknowledged that he relied on the grip strength calculation made by Dr. Moore's staff. He testified, "I didn't go through the machinations of performing the calculations."⁹

The ALJ found that Mr. Emery had a 10% impairment to the left upper extremity. He based this upon Dr. Poppa's determination that pursuant to the *Guides*, Mr. Emery had a 10% impairment for cubital tunnel syndrome. The ALJ determined the other 7% was "... crafted out of thin air to match up with Dr. Strong's rating."¹⁰ He then denied the claim for Mr. Emery's right upper extremity impairment because there was nothing in the record to indicate Mr. Emery's right elbow was injured at work.

⁸ *Id.*, at 24-25.

⁹ *Id.*, at 35.

¹⁰ ALJ Award (Nov. 4, 2011) at 4.

The ALJ awarded claimant interest in Docket No. 1,005,338 of 4.75% on \$4,396.10, commencing July 23, 2010, the date the Estate of Harry L. Emery became a party to the claim, for a total of \$269.37. This was based solely on the ALJ's award of disability benefits for Mr. Emery's left upper extremity.

Docket No. 1,038,104

On January 4, 2008, Mr. Emery filed an Application for Hearing in Docket No. 1,038,104, alleging that on or about December 20, 2007, he suffered injuries to his head, neck, back and all other affected areas during an altercation with a combative patient.

Dr. Poppa testified he never saw Mr. Emery, but was asked to perform a review of Mr. Emery's prior medical records concerning his injuries in Docket No. 1,038,104. Dr. Poppa reviewed the medical reports of Dr. Newkirk, Mr. Emery's family physician; a CT scan of Mr. Emery's head; a MR scan of his brain; a MR scan of his cervical spine; x-rays of his cervical spine; skull x-rays; and serum laboratory testing. Dr. Poppa also reviewed the medical records of Dr. Baade, a neurosurgeon; Dr. Staecker, an ear, nose and throat specialist; Dr. Bickell, a neurologist; Dr. Deutch, a neuropsychologist; Dr. Zarr and Dr. Satake. Respondent objected to anything in the medical records that was not placed into evidence.

Dr. Poppa testified that Mr. Emery was released from the care of Dr. Zarr with permanent restrictions as a result of a closed head injury with post-traumatic headaches. Mr. Emery was examined by Dr. Zarr at respondent's request and died six days after being examined by Dr. Zarr. According to Dr. Poppa, Dr. Zarr's records indicated claimant had auricular pain from the great auricular nerve. Dr. Zarr gave Mr. Emery a 17% permanent impairment to the body as a whole as a result of the head injury. Dr. Poppa testified that Dr. Zarr cited specific sections of the *Guides* in arriving at his opinion. Respondent objected that Dr. Zarr's opinion was hearsay. Dr. Zarr's report was introduced as an exhibit at Dr. Poppa's deposition and respondent's counsel objected that the report contained medical opinions of a non-testifying physician.

Dr. Poppa testified that in accordance with the *Guides*, Mr. Emery had a 17% permanent impairment to the body as a whole for the closed head injury. Respondent's counsel questioned Dr. Poppa at great length regarding what sections of the *Guides* he used to calculate Mr. Emery's permanent impairment for the closed head injury. Dr. Poppa indicated he relied on the medical records in arriving at his opinion. When initially asked how he arrived at 17%, Dr. Poppa testified, "I believe I stated that I did not write down any numbers but I have looked at the *Guides* and am familiar with the 17 percent as a result of closed head injury with post-traumatic headaches."¹¹ He indicated the pain Mr. Emery experienced from the headaches was of minimal intensity and the headaches occurred

¹¹ Poppa Depo. at 43.

occasionally to frequently. Dr. Poppa then testified that pursuant to Section 15.8 on pages 309-311 of the *Guides*, he assigned claimant a 10% impairment for frequency of the headaches and 7% for intensity of the pain. However, Dr. Poppa acknowledged that pages 310 and 311 contain no such numbers. In support of his opinion, Dr. Poppa stated:

And then again, I would go back to Chapter 1, Section 1.3 and indicate what it says, quote, the physician's judgment and his or her experience, training, skill, and thoroughness in examining a patient and applying the findings to Guides criteria will be factors in estimating the degree of patient's impairment.¹²

The ALJ found Mr. Emery had no permanent impairment as a result of his closed head injury. The ALJ reasoned that Dr. Poppa was not certain as to how Dr. Zarr arrived at a permanent impairment of 17%. Dr. Poppa never examined Mr. Emery, yet ". . . through his judgment, experience, training, skill and thoroughness in examining the patient"¹³ determined Mr. Emery had a 17% impairment. The ALJ found no probative value in Dr. Poppa's opinions.

The ALJ did not award claimant any interest pursuant to K.S.A. 44-512b in Docket No. 1,038,104 presumably because claimant failed to prove Mr. Emery suffered a permanent impairment and, thus, was not entitled to any permanent partial disability benefits.

PRINCIPLES OF LAW

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.¹⁴ The existence, nature and extent of the disability of an injured workman is a question of fact.¹⁵ The finder of fact is free to consider all the evidence and decide for itself the percent of disability the claimant suffers.¹⁶

K.S.A. 2001 Supp. and 2007 Supp. 44-508(g) define burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a

¹² *Id.*, at 45.

¹³ ALJ Award (Nov. 4, 2011) at 4.

¹⁴ K.S.A. 2001 Supp. and 2007 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

¹⁵ *Armstrong v. City of Wichita*, 21 Kan. App. 2d 750, 907 P.2d 923 (1995).

¹⁶ *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 76, 735 P.2d 247, rev. denied 241 Kan. 838 (1987).

preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 44-510e(b) states:

(b) If an employee has received an injury for which compensation is being paid, and the employee's death is caused by other and independent causes, any payment of compensation already due the employee at the time of death and then unpaid shall be paid to the employee's dependents directly or to the employee's legal representatives if the employee left no dependent, but the liability of the employer for the payments of compensation not yet due at the time of the death of such employee shall cease and be abrogated by the employee's death.

K.S.A. 2010 Supp. 60-225(a)(1) states:

Substitution if the claim is not extinguished. If a party dies and the claim is not extinguished, the court must on motion order substitution of the proper party. A motion for substitution may be made by any party or by the decedent's successor or representative. If the motion is not made within a reasonable time after service of a statement noting the death, the action by or against the decedent must be dismissed.

In *Belk*,¹⁷ a Board Member determined that K.S.A. 60-225(a)(1) applies to workers compensation claims. In *Graham*,¹⁸ the Kansas Court of Appeals stated:

K.S.A. 60-225(a) requires that a motion to substitute a successor party to a lawsuit must be made within a reasonable time after another party to the suit files notice of the death with the court. In determining whether such a motion has been filed within a reasonable time, the court should consider all relevant circumstances, including the diligence of the party seeking substitution, whether any other party would be prejudiced by the delay, and whether the party to be substituted has shown that the action or defense has merit.

The Court in *Graham* went on to say there is no bright-line test that can be applied when determining what is a reasonable time period under K.S.A. 60-225(a) and noted that the statute does not give a specific deadline for filing a motion for substitution.

K.S.A. 44-520a(a) states:

¹⁷ *Belk v. State of Kansas*, No. 1,024,926, 2010 WL 769922 (Kan. WCAB Feb. 25 2010).

¹⁸ *Graham v. Herring*, 44 Kan. App. 2d 1131, Syl. ¶ 1, 242 P.3d 253 (2010), *pet. for rev. granted* Oct. 7, 2011.

(a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

K.S.A. 44-512b(a) states:

(a) Whenever the administrative law judge or board finds, upon a hearing conducted pursuant to K.S.A. 44-523 and amendments thereto or upon review or appeal of an award entered in such a hearing, that there was not just cause or excuse for the failure of the employer or insurance carrier to pay, prior to an award, the compensation claimed to the person entitled thereto, the employee shall be entitled to interest on the amount of the disability compensation found to be due and unpaid at the rate of interest prescribed pursuant to subsection (e)(1) of K.S.A. 16-204 and amendments thereto. Such interest shall be assessed against the employer or insurance carrier liable for the compensation and shall accrue from the date such compensation was due.

ANALYSIS

Issues Applicable to Both Claims

A Motion for Substitution of Party was filed by Mr. Emery's widow nine months after Mr. Emery's death. Respondent chooses to focus on the length of time it took for the Motion for Substitution of Party to be filed, rather than the reason for the delay. Respondent's counsel cited several cases where a party filed a motion to substitute within nine months after the original party died, and the court dismissed the case because the motion to substitute was not filed in a reasonable time.

In *Graham*, the Kansas Court of Appeals determined that in order to determine what constitutes a "reasonable time" pursuant to K.S.A. 60-225(a)(1), a fact finder must consider all relevant factors. After the death of her husband, Lisa Emery discharged his former attorney and hired her current counsel, who then filed the Motion for Substitution of Party. Nine months to accomplish this task is reasonable. As pointed out by the ALJ, K.S.A. 44-520a permits a claimant to serve a claim for compensation upon an employer within one year after the employee's death. Respondent has failed to prove it was prejudiced because the Motion for Substitution of Party was not filed until nine months after Mr. Emery's death. After considering all the relevant facts as required by K.S.A. 60-225(a)(1), the Board affirms the ALJ's finding that the Motion for Substitution of Party was filed within a reasonable time.

Next, the Board turns its attention to the issue of whether the ALJ erred in finding that pursuant to K.S.A. 44-512b, claimant was entitled to interest in Docket No. 1,005,338 commencing July 23, 2010, based only upon a 10% permanent impairment to the left upper extremity. Respondent raised as defenses the nature and extent of claimant's injuries and maintained that the Motion for Substitution of Party was not filed within a reasonable time. Neither of these defenses is frivolous. Respondent's contention that it acted with just cause in denying disability benefits is bolstered by the fact that the ALJ found persuasive respondent's position on the nature and extent of Mr. Emery's disability. In *Jagger*,¹⁹ the Board found there were legitimate questions concerning the nature and extent of Jagger's injury and disability and, therefore, just cause existed for respondent to delay paying Jagger's disability benefits. The Board denied Jagger's request for interest. Accordingly, the Board denies claimant's motion for interest in both claims.

Docket No. 1,005,338

Dr. Poppa opined Mr. Emery had a 17% permanent impairment to the left upper extremity, which was the same percentage Dr. Strong assigned Mr. Emery. Dr. Poppa was able to explain that 10% of the 17% functional impairment was pursuant to Table 16 on page 57 of the *Guides*. When asked how he arrived at the remaining 7% permanent impairment, Dr. Poppa's response was that the *Guides* does not cover every type or degree of impairment. The Board finds that explanation does not satisfy the requirement of K.S.A. 44-510e(a) that a functional impairment must be based upon the *Guides*. Accordingly, the Board affirms the ALJ's finding that claimant sustained a 10% permanent functional impairment to the left upper extremity at the level of the elbow.

Dr. Poppa's explanation of a nexus between Mr. Emery's work-related activities and his right upper extremity injury is not supported by sufficient evidence. Dr. Poppa did not know when Mr. Emery's right upper extremity symptoms began. His theory as to why Mr. Emery did not begin medical treatment for his right upper extremity injury until approximately four years after he reached MMI on the left upper extremity injury has little basis in fact. Dr. Poppa could not identify the work activities that caused, aggravated, accelerated or exacerbated Mr. Emery's right upper extremity condition. Simply put, claimant did not meet its burden of proof that Mr. Emery's right upper extremity injury was the result of repetitive work-related activities.

Docket No. 1,038,104

The *Guides* does not assign specific numbers for impairment from headaches. Dr. Poppa opined that based upon the frequency of Mr. Emery's headaches and the intensity of the pain, Mr. Emery had a 17% permanent impairment to the body as a whole for his closed head injury. Dr. Poppa testified that the *Guides* allowed him to rely on his

¹⁹ *Jagger v. C & G Drilling*, No. 1,026,249, 2008 WL 2002917 (Kan. WCAB Apr. 30, 2008).

judgment, experience, training, skill and thoroughness in examining the patient. However, Dr. Poppa never examined Mr. Emery. He arrived at his opinion by reviewing Mr. Emery's medical records.

Claimant argues that Dr. Poppa's medical opinions are uncontroverted and, therefore, should be adopted. The Board recognizes uncontradicted medical testimony unless shown to be improbable, unreasonable or untrustworthy, may not be disregarded.²⁰ While the trier of fact cannot arbitrarily or capriciously refuse to consider the testimony of any witness, it is not obliged to accept and give effect to any evidence which in its honest opinion is unreliable, even if such evidence is uncontradicted.²¹

Dr. Poppa's opinion concerning Mr. Emery's functional impairment is unreliable. Dr. Poppa testified his opinions were in accordance with the *Guides*. Asserting one's opinion is in accordance with the *Guides* does not make it so. Dr. Poppa's repeated reliance on Section 1.3 of the *Guides* is misplaced. He seems to believe that section allows him unlimited leeway to ignore the remainder of the *Guides*. Simply put, claimant failed to prove by a preponderance of the evidence that Mr. Emery sustained a permanent impairment as a result of his closed head injury.

CONCLUSION

1. In both claims, claimant filed its Motion for Substitution of Party within a reasonable time.

2. In Docket No. 1,005,338, claimant sustained a 10% permanent functional impairment to the left upper extremity.

3. In Docket No. 1,005,338, claimant failed to prove by a preponderance of the evidence that Mr. Emery sustained a work-related injury to his right upper extremity.

4. In Docket No. 1,038,104, claimant failed to prove by a preponderance of the evidence that Mr. Emery sustained a permanent impairment as a result of his head injury.

5. Claimant's motion for interest, pursuant to K.S.A. 44-512b, is denied in both claims.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.²² Accordingly, the findings

²⁰ *Anderson v. Kinsley Sand & Gravel, Inc.*, 221 Kan. 191, 558 P.2d 146 (1976).

²¹ *Collins v. Merrick*, 202 Kan. 276, 448 P.2d 1 (1968).

²² K.S.A. 2010 Supp. 44-555c(k).

and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses that part of the November 4, 2011, Award entered by ALJ Hursh which granted claimant's motion for interest in Docket No. 1,005,338, and affirms the remainder of the Award.

IT IS SO ORDERED.

Dated this ____ day of March, 2012.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joshua P. Perkins, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Kenneth J. Hursh, Administrative Law Judge